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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-230

NEWARK TEACHERS UNION, etc., *et al.*,

Petitioners,

—v.—

THE BOARD OF EDUCATION OF NEWARK, etc.,

Respondent.

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AS *AMICUS CURIAE*, IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

It is hereby respectfully moved pursuant to Rule 42 of The Rules of this Court that the above named *amicus curiae* be granted leave to file the accompanying brief in support of the Petitioners.

Consent to such filing has been requested and has been granted on behalf of the Petitioners. Counsel for the Respondents have been unable to grant or deny the request in adequate time for the accompanying brief to be filed. The Petitioners' letter of consent has been filed with the Clerk.

The interest of the *amicus curiae* as stated in the accompanying brief is as follows:

The American Civil Liberties Union is a nation-wide, non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the

defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the protection of First Amendment rights from the unlawful actions of state officials, and with the procedures by which such unlawful restraints can be responsibly and peacefully challenged in the courts.

This case presents significant issues concerning the doctrine of overbreadth of the First and Fourteenth Amendments. It raises also a point of conflict between recent Supreme Court decisions concerning the lawful challenge of unlawful authority exercised against individual free speech. The accompanying brief addresses these points.

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

Interest of *Amicus Curiae*

The American Civil Liberties Union is a nation-wide, non-partisan organization with approximately 160,000 members in the United States. It is engaged solely in the defense of those principles embodied in the Bill of Rights. During its fifty-year existence, the ACLU has been concerned with the protection of First Amendment rights from the unlawful actions of state officials, and with the procedures by which such unlawful restraints can be responsibly and peacefully challenged in the courts.

This case presents significant issues concerning the doctrine of overbreadth of the First and Fourteenth Amendments. It also raises a point of conflict between recent Su-

preme Court decisions concerning the lawful challenge of unlawful authority exercised against individual free speech.

Questions Presented

I. Whether the constitutionality of an injunction issued *ex parte,* without a showing that notice could not be served, may be challenged in defense of a prosecution for criminal contempt for violation of that injunction.

II. Whether the constitutionality of an injunction issued *ex parte,* may be challenged in defense of a prosecution for criminal contempt for violation of that injunction when the injunction is so vague as to persons enjoined and activities proscribed as to be incapable of rational interpretation by men of common intelligence.

Statement of the Case

Petitioners, a local union and 186 individuals (including one non-member teacher, one retired teacher, and one local college instructor), were convicted in summary criminal contempt proceedings for violation of an *ex parte* injunction designed to halt a strike and all strike-related speech activities connected with an on-going labor dispute. They face penalties of from ten to ninety days in jail and fines from a $200 minimum, for individuals, to $40,000 for the union.

On January 31, 1970, the date of expiration of the collective bargaining contract, after lengthy negotiations between the parties, the Newark Board of Education ob-

tained an *ex parte* injunction to restrain a strike and all supportive activity by the union, eleven named officers, and unnamed and indeterminate individuals. As the Board had known since January 16, the union was planning to meet February 1 to decide whether to strike if no accord were reached by January 31. No notice, formal or informal, was given any petitioner prior to the issuance of the injunction, notwithstanding the provisions of New Jersey Rule 4:52-1(a). Not until the order had been issued were efforts made to notify the named officers and to post copies on bulletin boards and print it in the newspapers.

A strike commenced February 2 and continued for four weeks. Throughout the strike, there was no violence or threat thereof, no mass picketing or other coercive action. Almost 3,000 of the 4,000 teachers in the Newark school system stayed away from work, including these petitioners. Petitioners were also found to have been picketing or congregating near the schools over the period February 11-20 when the arrests were made. Civil rights leader Bayard Rustin was arrested for contempt for addressing a union rally in Newark February 8.

The injunction (Petition for Writ of Certiorari, pp. 5-8) was issued without modification by the court and without consideration of the issues in and causes of the strike. Nor did the court consider whether it might have drawn its order more narrowly.

Reasons for Granting the Writ

The essence of the substantive dispute between the union and the State is that for years New Jersey has been able to apply its broad common law proscription of public employee strikes to all manner of group activity in support of public employee grievances against the State. As public employee unionism has proliferated and as the issues in public sector labor disputes have become increasingly complex, many states have confronted the challenge through legislation, experimenting with new solutions to new problems. New Jersey, however, has utterly failed to join issue, preferring to muddle through with overbroad injunctive authority without regard to constitutional limitations of due process and freedom of speech or to any lasting resolution of the underlying social issues.

The above argument is persuasively set forth in parts II and III (pp. 19-33) of the Petition for Writ of Certiorari. We concur and feel no need to elaborate upon that argument here. Our more pressing concern is that the Court might feel that it cannot reach the substantive unconstitutionality of the injunction because the issue is raised in defense of criminal contempt charges for violation of that injunction. *Walker* v. *City of Birmingham,* 388 U.S. 307 (1967). It shall be the burden of this brief *amicus curiae* to show that *Walker,* when read with *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968), compels the Court to hear the substantive issue in defense of the criminal contempt charges. *Amicus curiae* shall show further that to apply *Walker* where the injunction against speech is so overbroad, both as to persons covered and as to activities proscribed, as to be incapable

of common interpretation by reasonable men, is to foster litigation discrediting lower state courts while seriously abridging First Amendment and Due Process rights of the citizenry at large.

I.

Injunctions issued *ex parte* without a showing that opposing party could not be served are void.

The fact is uncontroverted that no effort was made to give notice, formal or informal, of the proceedings in which the *ex parte* injunction was obtained against petitioners. No possible excuse exists for this unconstitutional omission.

In *Carroll* v. *President and Commissioners of Princess Anne County,* 393 U.S. 175 (1968), county officials obtained an *ex parte* injunction to ban a rally of which they had less than 24 hours notice. The organizers of the rally, though present in the county, had no established offices or attorneys for convenient service of notice of the injunction proceedings. The rally was scheduled for that same night. In spite of these difficulties this Court held that:

> there is no place within the area of basic freedoms guaranteed by the First Amendment for [*ex parte* temporary restraining orders] where no showing is made that it is impossible to serve or notify the opposing parties and to give them an opportunity to participate. 393 U.S. at 180.

The injunction issued in *Carroll* was based on predictions of violence flowing from the rally and the physical disturbance to the community caused by amplification of the speakers.

In the instant case, school board officials knew on January 16, more than two weeks before the issuance of the *ex parte* order, of the union's plans to strike if no accord were reached by January 31. The union maintained regular offices in Newark, had lawyers on retainer in Newark, and were in contact with school board officials in negotiating sessions at the time the injunction was sought. The meeting to decide whether to strike was to be held the day after the injunction proceedings. Unlike the situation in *Carroll,* one could infer an intent on the part of the school board officials purposely to avoid an adversary hearing on the injunction. Like the situation in *Carroll,* the injunction was sought to restrain both pure speech and speech mingled with conduct.

This Court has not yet been presented with an opportunity to detail the effect of the holding of *Carroll* on the rule of *Walker* v. *City of Birmingham,* 388 U.S. 307 (1967), that violators of an injunction may not defend criminal contempt charges by asserting the unconstitutionality of that injunction. See generally, Monaghan, *First Amendment "Due Process,"* 83 Harv. L. Rev. 518, 535-38 (1970); Rodgers, *The Elusive Search for the Void Injunction: Res Judicata Principles in Criminal Contempt Proceedings,* 49 B.U.L. Rev. 251 (1969). Although the injunction in *Walker* was *ex parte,* the Court did not consider the impact of that fact on the case. However, in *Carroll* the Court was clearly concerned with insuring Due Process in the initial injunction proceeding in light of its earlier decision in *Walker* that such injunctions were not to be disobeyed. 393 U.S. at 179.

Statutes may be disobeyed and their constitutionality raised as a defense in subsequent criminal proceedings.

Shuttlesworth v. *City of Birmingham,* 394 U.S. 147 (1969); *Staub* v. *City of Baxley,* 355 U.S. 313 (1958); *Hague* v. *CIO,* 307 U.S. 496 (1939). Administrative orders may not be so challenged without exhaustion of administrative remedies, *Poulos* v. *New Hampshire,* 345 U.S. 395 (1953). However, inroads have been made on the exhaustion requirement where "there appears no significant interest to be served in having the [administrative] system decide the issue before it reaches the courts." *McKart* v. *United States,* 395 U.S. 185, 200 (1969). One may disobey an unlawful police order and not be convicted. *Wright* v. *Georgia,* 373 U.S. 284 (1963). See generally, Note, *Defiance of Unlawful Authority,* 83 Harv. L. Rev. 626 (1970); Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt,* 4 Harv. Civ. Rights Civ. Lib. L. Rev. 135 (1968). That one may not raise the unconstitutionality of a court order in defense of a criminal contempt charge for violation of that order is thus more than a reflection of the policy that we are a government of laws not men; it is clear that some official expressions of the law may be violated to test their constitutionality. Rather it is "respect for the judicial process," 388 U.S. at 321, which is at stake in *Walker* But see *Fields* v. *Fairfield,* 375 U.S. 248 (1963).

What is it that is special about the judicial process? The Court suggests one answer in *Carroll*:

> The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. 393 U.S. at 183.

Thus a part of the special authority of courts to state the law derives from their procedures: two parties present two sides to a specific dispute and ask the courts to find facts and apply the law. Where one side is not represented, a part of that special authority is eroded, and the resulting order is no more worthy of blind obedience than the unconstitutional statute or the unlawful order of a police officer. The Court cannot require petitioners to obey a "judicial" order formulated without benefit of a "judicial" hearing. Similarly, an order resulting from an *ex parte* proceeding is more likely to be in error as to fact and law, a problem which is compounded in the area of First Amendment rights.

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of public order . . . the failure to invite participation of the party seeking to exercise First Amendment rights reduces the possibility of a narrowly drawn order, and substantially imperils the protection which the Amendment seeks to assure. 393 U.S. at 183-84.

Nor does the prospect of expedited appellate or *de novo* review of an *ex parte* order salvage the damage to First Amendment rights. In *Carroll,* respondents had argued that petitioners had available to them a full adversary hearing on the *ex parte* order within two days of issuance of the order. This Court found two days to be too much "in view of the First Amendment's imperative." 393 U.S. at 184. The Court went on to say:

> The denial of a basic procedural right in these circumstances is not excused by the availability of a post-issuance procedure which could not possibly serve to rescue the August 7 meeting, but at best, could have shortened the period in which petitioners were prevented from holding a rally. *Ibid.*

The stakes involved in a public employee labor dispute, in which political issues are frequently paramount, are no less significant.

> As soon as you require unions and workers to obey a court order, you have in all likelihood effectively broken the strike, and without there having been an opportunity for the merits of the controversy to be heard. Watt, *The Divine Right of Government by Judiciary,* 14 U. Chi. L. Rev. 409, 443 (1947). *Accord,* C. Summers and H. Wellington, *Cases on Labor Law* 163-68 (1968).

Indeed, there is some tension between the disdain shown by the Court in *Carroll* for expedited review procedure and the general rule of *Walker* requiring appeal rather than disobedience. How is the rule of *Carroll* to be enforced against recalcitrant state officials? Political expedience dictates that results are most easily achieved through *ex parte* proceedings. If such proceedings are later held unconstitutional, no matter—exercise of First Amendment rights has been effectively abridged and the political crisis has passed. There is no sanction.

This Court must evaluate the relation of *Carroll* to *Walker.* Permitting disobedience of injunctions where state officials have abrogated their clear constitutional duty as

expressed in *Carroll* to make reasonable efforts to give notice of injunction proceedings will open no floodgates of disrespect for the courts. Rather, such a rule would compel lower courts to accord all parties "a basic procedural right" in the resolution of their disputes. It would create better law in the courts of first instance and would increase respect for the judicial system. If judicial orders are to be accorded respect superior to that of statutes and the orders of law enforcement officers, then this Court must insure that those orders are worthy of that greater respect.

Finally, it must be underscored that these petitioners are faced with jail and all that a criminal conviction implies. They are being punished for their contempt for a court order issued in flagrant disregard for a perfectly clear-cut constitutional mandate. One must ask whether their contempt is deserved in this instance. No state interest even arguably legitimate was served in the failure to give petitioners notice of the injunction proceeding. The only purpose of such a procedure was to avoid the constitutionally mandated adversary hearing and thereby to corrupt the institutions of justice. For this petitioners are not the parties deserving of this Court's censure.

II.

Applying *Walker* to persons whose speech and conduct may arguably be proscribed by an unconstitutionally vague injunction will foster unnecessary litigation, discredit lower state courts, and chill speech.

Not only was the injunction of January 31 obtained in flagrant violation of *Carroll,* but it was subsequently applied in criminal contempt proceedings to an unusually and unconstitutionally broad range of speech and conduct by an overly broad class of people. This substantive objection to the injunction, detailed in parts I and II (pp. 13-29) of the *Petition for Writ of Certiorari,* is equally significant to a determination of whether any or all the petitioners have foreclosed their right to challenge the substantive validity of the order by not appealing before violating it.

Past injunctions have been as broad, but never has this Court been presented with a case in which such an injunction has been so broadly enforced with criminal convictions and jail, both as to classes of defendants and as to types of speech and conduct. *Petition* at 14-17. The procedural effect of such an overreaching order is that many petitioners could not have foreseen that the speech and/or conduct they had set out for themselves would be covered by the injunction. Thus, these petitioners could not have seen the need for appealing the order and, in fact, could have determined with the best of legal advice that had they appealed the order, their appeals would have been dismissed for lack of standing. Thus, for many, the only way to bring the illegality of the order to the scrutiny of judicial review was to engage in speech activities which

could or could not be held by a trial court to violate the order.

It is conceded that the injunction was at least intended to prevent a strike and that a handful of petitioners were named in the injunction. But even those named were forbidden from such remote activities as "loitering" and "gathering . . . in the vicinity of . . . premises of the plaintiff." Thus, one named in the injunction could be arrested for merely being in the proximity of the Newark City Hall (attached to the Board of Education administrative office) whatever his purpose in being there. Efforts to leaflet near City Hall merely to inform the public of the grievance could be punished with jail.

As for those not named in the order, petitioners include a large number of rank and file union members; a retired teacher, Mrs. Alice Saltman; a non-union striking teacher, Miss Joan Stevens; and a sympathizer who was neither a union member or a Newark teacher, Mr. Jerry Meyer. Had these, persons, especially those not members of the union, wished to challenge the illegality of the injunction, it is highly unlikely they would have been granted standing to appeal, given their lack of relationship to the parties named in the order. Nor is there reason for an appellate court to assume that the injunction would be enforced against these petitioners or against First Amendment protected activity. Indeed, to so assume would undercut the integrity of the lower courts of New Jersey and foster time-consuming litigation by all parties in and around Newark who sympathized with the union to determine whether they and their proposed speech or other supportive activity or non-activity was to be covered by the ban. Surely this is not the result envisioned by the rule in

Walker, nor could it be the result were lower courts effectively required to fashion narrower orders.

The charging of Mr. Bayard Rustin with contempt for his speech to a union rally February 8 is significant, even though he was not convicted, for its symbolic impact in chilling speech and association in connection with the union's grievances. That the injunction could be interpreted so broadly by law enforcement officials is a clear indication of its constitutional infirmity. The State did not need to convict Mr. Rustin to achieve its dampening objective. Thus many persons, as unconnected with the union as Mr. Rustin, engaging or planning to engage in speech activities as remote from parading, picketing, and striking as those of Mr. Rustin, could be censored from speaking on the highly political issues in the strike and from associating with union members. They would know from the arrest and from the standard implied in *Walker* that they too could be convicted of contempt, regardless of the unconstitutionality and bad faith of the injunction.

Thus, to apply the general rule of *Walker* to an injunction which runs so far afoul of First Amendment and Due Process concepts of overbreadth is to have substantial deleterious impact on the exercise of protected First Amendment freedoms and to create unreasonable obligations on ordinary citizens, unconnected with the principals in a public employee labor dispute, to affirmatively litigate their right to speak on that public issue. This Court must meet these issues if the integrity of the lower state courts is to be protected and the individual's right to speak is to be maximized.

Although we urge the issue of overbreadth as a separate and distinct argument for permitting petitioners to be heard on the substantive constitutionality of the injunction,

it is clear that this point is also in some sense related to our first argument based upon *Carroll*. Without the *ex parte* procedure at the start, the issuing court would have been far less likely to have framed an order so patently violative of First Amendment rights. If the lower courts could be made to follow constitutional guidelines in their procedures for issuing injunctions, there would be less reason to violate those orders to test their constitutionality. The injunction in this case, however, bears all the infirmities, substantive and procedural, of an unconstitutionally overbroad statute. To require that such an overbroad order, issued *ex parte*, be obeyed by all persons who could conceivably be covered by it and challenged only through the mechanism of appellate review is to ignore the realities of this particular breed of judicial order.

CONCLUSION

Because this case raises important areas of tension between the decisions of this Court in *Carroll* and *Walker*, and because important areas of First Amendment activity and the effective functioning of lower state courts stand to be severely impaired, *amicus curiae* respectfully requests this Court to grant the *Petition for Writ of Certiorari*.

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